BRIEF IN SUPPORT OF PETITION

OPINION BELOW

Although this case involved an appeal and cross-appeal from the judgment of the trial court, one opinion, written by Judge Alfred P. Murrah, was delivered on November 26, 1943, by the Circuit Court of Appeals. It appears on pages 71 to 79 of the transcript. The opinion is reported in 139 Fed. (2d) 248.

FACTS

Since the facts are detailed hereinabove as a part of the petition, we shall not burden this brief with a further recitation thereof other than to emphasize certain portions as a necessary adjunct to this brief.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1 (43 Stat. 938 [28 U. S. C. A., § 347 (a)]), providing in part that:

> "In any case, civil or criminal, in a circuit court of appeals * * *, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether government or other litigant, to require by certiorari, either before or after a judg-

ment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Jurisdiction of this Court further is supported by Rule 38, Sec. 5, Subsec. (b), Rules of the Supreme Court of the United States, as amended, which provides that a writ of certiorari may be granted "where a circuit court of appeals has * * * decided an important question of federal law which has not been, but should be, settled by this Court; or has decided a federal question in a way probably in conflict with applicable decisions of this Court * * *."

ARGUMENT

I.

In holding that a federal court had jurisdiction of the case, the Circuit Court erroneously decided a question never before determined by this Court, but which should be resolved thereby.

Despite the provisions of the Act of April 20, 1940, as amended (28 U. S. C. A., § 41 [1]), the text of which is set out in Appendix One following the brief, the Circuit Court ruled that the lower court had jurisdiction of the suit. This act denies jurisdiction in federal courts of suits to enjoin the collection of taxes imposed pursuant to state law where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state.

While the Circuit Court opinion casually adverted to the belief that the United States of America is not affected by the restrictive provisions of the above act, it based its principal holding upon the theory that such a remedy does not exist in the state courts of Oklahoma. We urged in the Circuit Court that the question of whether the United States of America is placed by the above act on a like plane with other litigants be resolved, but following an implication that it is not so situated the Circuit Court said:

> "We deem it unnecessary, however, to resolve this particular question, since we are convinced that a plain, speedy and efficient remedy at law or in equity in the courts of the state is not available to the United States."

Petitioners feel entitled to a determination of whether the State of Oklahoma in like cases where a plain, speedy and efficient remedy is available in its courts is entitled to have such suits brought in state courts rather than in federal courts. The jurisdiction act above specifically named the United States of America and in a proviso denies the entertainment in a federal court of tax injunction suits involving state taxes. A strict construction of the act brings the United States of America within its terms. It has recently been said that the policy of this section and due regard for the rightful independence of state governments both call for a strict construction of jurisdictional requirements. *Central Mexico Light & Power Co.* v. *Munch* (Second Circuit), 116 Fed. (2d) 85.

And this Court has ruled that federal courts should scrupulously confine their own jurisdiction to the precise limits which have been defined by this section, in due regard for rightful independence of state governments. *City of Indianapolis* v. *Chase National Bank*, 62 S. Ct. 15, 314 U. S. 63, 86 L. ed. 47.

The problem of whether the United States of America may enter its own courts to settle litigation over tax injunction disputes arising under the laws of the state becomes increasingly complex under the act here giving the Secretary of the Interior the authority to purchase lands for Indians. The title to such lands will be held in the name of the United States of America. Much litigation will result. Whatever be the ultimate outcome, it is our assertion that the independence of state judicial processes should be preserved inviolate in their own sphere. Such is the intent and purpose of the act limiting the jurisdiction of federal courts of these suits.

The argument hereinabove assumes the existence of a plain, speedy and efficient remedy at law or in equity in the courts of the state. The Circuit Court held otherwise and said that "we are convinced that a plain, speedy and efficient remedy at law or in equity in the courts of the state is not available to the United States." The Circuit Court, in its opinion, considered only the nonexistence of a remedy at law and wholly ignored a remedy in equity which does exist in the state courts. The opinion erroneously limited its holding to suits at law where a

tender of payment under protest is necessary as a condition precedent to maintenance of the action. It took no account of statute and court decisions in Oklahoma establishing the right to restrain the collection or assessment of illegal taxes. Title 12, Okla. Stat. 1941, § 1397.[1] *This remedy is available only where the aggrieved party has no taxable property within the tax district of which complaint is made.* Title 68, Okla. Stat. 1941, § 15.49, quoted in part.[2] The United States of America certainly has no taxable property in Pawnee County since under Art. 10, § 6 of the Oklahoma Constitution, all property of the United States of America is exempt from taxation.

Title 68, Okla. Stat. 1941, § 360, provides that tender of payment must be made to support a suit to enjoin the collection or assessment of a tax, but our courts have said that where a tax is alleged to be illegal and void this rule does not apply. *Meriwether* v. *Bowling* 184 Okla. 1, 84 Pac. (2d) 1; *Eakin et al.* v. *Chapman*, 44 Okla. 51, 143 Pac. 21; *Jones* v. *Holzapfel et al.*, 11 Okla. 405, 68 Pac. 511.

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1. 12 O. S. 1941, Sec. 1397:

"An injunction may be granted to enjoin the enforcement of a void judgment, the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same . . ."

2. 68 O. S. 1941, Sec. 15.49:

". . . Equitable remedies shall be resorted to only where the aggrieved party has no taxable property within the tax district of which complaint is made."

We repeat that the federal court did not have jurisdiction of this suit for the foregoing reasons, and the Circuit Court has thus (1) erroneously decided that a remedy does not exist in the state courts and (2) refused to determine whether the United States of America may sue in its own courts in this class of cases despite the provisions of the act quoted in Appendix One hereto which denies jurisdiction therein.

II.

The Circuit Court held the act under discussion to be a valid delegation of legislative power contrary to general principles of law announced by this Court.

By the act the Secretary of the Interior is given power to acquire agricultural and grazing lands of good quality and character for any Indian suitable to the need of the Indian for whom acquired. The character of the land and its suitability to the need of the beneficiary thus are the sole limitations upon the power of the secretary. The act opens for him an avenue of unrestrained official conduct in purchasing unlimited quantities of land for whomever among the Indian tribes he may deign to choose. It lays down no standard or rule of action for him to follow, and in effect, leaves to his official conscience and discretion the right to determine what the law shall be, upon whom its benefits may be showered and to whom its gifts may be denied. We believe that the following outline fairly states the law governing the delegation of legislative power:

1. Congress may not delegate its powers to make laws

2. Congress may delegate the power to make rules or exercise discretion in the execution of a law—

   but:

   such law must contain a framework, rule, guide or policy, within which the rules or discretion are to be exercised.

3. The right to exercise unrestrained and arbitrary discretion may not be the subject of delegation, and any law purporting to grant such right is void.

The law relating to delegation of legislative power has on numerous occasions been the subject of extensive review by this Court. In *Panama Refining Co.* v. *Ryan*, 55 S. Ct. 241, 293 U. S. 388, 79 L. ed. 446, at page 464, it is said:

> "Thus, in every case in which the question has been raised, the court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that § 9 (c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.
>
> "If § 9 (c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function the Congress could at will and as to such subjects as it chooses transfer that function to the president or other officer or to any administrative body. The question is not of the intrinsic im-

portance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government."

To escape the forbidden unconstitutional exercise of legislative or judicial authority, the discretion granted by a statute must be lawfully exercised in accordance with established principles of justice. As said in 11 American Jurisprudence, at page 947:

> "It cannot be a mere arbitrary choice, for it has been said that in the American system of government no room is left for the play and action of purely arbitrary power. A distinction is consequently drawn between a delegation of the power to make the law which necessarily includes a discretion as to what it shall be and the conferring of authority or discretion as to its execution. The first cannot be done, but the second, under certain circumstances, is permissible."

Yick Wo v. *Hopkins*,
6 S. Ct. 1064, 118 U. S. 356, 30 L. ed. 220;
Union Bridge Co. v. *United States*,
27 S. Ct. 367, 204 U. S. 364, 51 L. ed. 523.

The act under discussion may be said to be one of a series in a long line of Indian legislation immunizing lands held by such persons from the taxing power of the states. But a sharp line of demarcation may be drawn between this act and prior legislation in that it has been the broad policy of Congress to deal equally with Indians of a like class. Quantum of blood and membership in a particular band or tribe have long been considerations influencing Congress in the passage of tax exemption laws affecting Indian lands. It is a matter fraught with

extreme doubt that Congress itself, under its admitted plenary power to deal with Indians, may treat disproportionately two similarly situated Indians from mere whim or caprice. *We contend that certainly it cannot delegate the power to do so.*

The Circuit Court thus has decided an important question of federal law which has not, but should be, resolved by this Court.

III.

The Secretary of the Interior has misapplied the act in such a manner that his acts are not within the scope of the legislation.

If the act be valid and if the manner in which the Secretary of the Interior gave exercise to his discretion thereunder be appropriate, as held by the Circuit Court, Oklahoma stands powerless to resist future misapplications of the act. Its tax revenues, already decreased by a myriad of federal tax exemption legislation covering Indian lands and a vast quantity of other lands acquired by the federal government in Oklahoma, threaten to be further diminished if the secretary is left free to pursue schemes and plans to remove otherwise taxable property from the tax rolls.

The evidence in this case, as detailed in the petition hereto, points to the existence of such a scheme and plan in the instant situation. Colonel Moore first intended to deed a piece of non-taxable land to his children. He was

advised by the Assistant Indian Commissioner through the Pawnee Indian Agency to make taxable land the subject of the conveyance. The principal purpose of the transfers to his minor children was not to safeguard their welfare under the act, *but to effect a removal from the tax rolls of some of his land and relieve him of the tax burden.* We are sympathetic toward a landowner unable to discharge tax obligations upon his property through adversity and economic assaults, but, peculiarly enough, the burden of taxes has been found an insuperable obstacle to retention of land by many Oklahoma citizens without Indian blood. We cannot even remotely entertain the belief that Congress, in passing the act herein, intended to lend itself to such a blatant scheme of depriving the State of Oklahoma from rightful tax revenue under the pretended guise of a lawful and appropriate exercise of the benefits granted by the statute.

Heretofore, Congress has wisely imposed limitations upon land quantity in allotments and grants to Indians. The act here does not fix any such limitation other than to state in general terms that the lands must be in proportion to the respective needs of the particular Indian or Indians. No condition of poverty or need is directed to be fulfilled by the beneficiary. For example, a rich Indian owning 10,000 cattle might have a vast acreage acquired for him and contend that it is in "proportion to his needs." Such an interpretation is absurd, but the Circuit Court opinion does not prevent this result. If

the act means anything, it approves the acquisition of lands for landless Indians who may be placed upon it and become self-sustaining. The committee reports and debates in Congress disclose that such was the congressional intent. Excerpts from said reports and debates are set out in Appendix Three following this brief. It is undisputed that the minor children of Colonel Moore, for whom the lands were acquired herein, live at home and the property is rented to tenants (Transcript, p. 20). The government contends that lands to be rented out are proportional to these children's needs, as they may need the income from the rented property. If Congress did not intend that the Indians should be required to live upon and till the land, why was the power to purchase restricted to agricultural and grazing land? If rental property could be "in proportion to the needs" of the Indians, why could not town property be purchased, especially when it is commonly known that a better return can be had from town rentals than from farm rentals. It is evident that Congress did not intend to include rental property under the term "respective needs of the particular Indian."

The trial court erroneously held, in which holding it was supported by the Circuit Court, that the land involved herein was "agricultural and grazing lands of good character and quality." The evidence contained in the stipulation (Transcript, pp. 11, 12, 13, 14, 20 and 21) reveals that the land so purchased was negligible in value

and was rented for amounts so small as to dispute the fact that it was of such character. The Circuit Court was not bound to accept the facts found by the trial court under the general rule of law. In *Photoplay Pub. Co.* v. *La Verne Pub. Co., Inc.* (Third Circuit), 269 Fed. 730, it is said:

> "The rule that appellate courts will generally accept the facts found by the trial court, which is based on the better opportunity of the trial judge to pass upon the credibility of witnesses, whom he sees and hears, does not apply in a suit where the testimony was taken by deposition and was uncontradicted."

See, also, *United States of America* v. *Corporation of the President of the Church of Jesus Christ of Latter-Day Saints et al.* (Tenth Circuit), 101 Fed. (2d) 156.

IV.

In holding that the land involved was taxable for the year 1940, the Circuit Court has ignored decisions of this Court and its own.

The lower court held that the lands here were taxable for the year 1940. The United States of America took a cross-appeal and the Circuit Court ruled that the lands were non-taxable for such year on the theory that as the deeds of conveyance were executed on October 19, 1939, and were approved by the Secretary of the Interior on August 7, 1940, the date of such approval related back to the execution date.

We contend that the United States did not accept the lands conveyed until the Secretary of the Interior

accepted same by giving his approval thereto. Consequently, the conveyances were not effective to convey title to the United States until August 7, 1940, when the Secretary of the Interior accepted and approved the conveyances.

In *United States* v. *Alabama*, 61 S. Ct. 1011, 313 U. S. 274, 85 L. ed. 1327, in paragraph three of the syllabus:

> "An inchoate lien imposed by a state statute as of the tax day for taxes to be assessed during the year is valid as against the United States, where it acquires the property after the tax day, though before the perfecting of the lien by final assessment of the tax."

In the body of the opinion, the Court said:

> "* * * We perceive no reason why the United States, albeit protected with respect to proceedings against it without its consent, should stand, so far as the existence of the liens is concerned, in any different position from that of other purchasers of lands in Alabama who take conveyances on and after the specified tax date. It is familiar practice for grantees who take title in such circumstances to see that provision is made for the payment of taxes and the government could easily have protected itself in like manner."

It is established by Oklahoma law that the assessment date, January 1st, fixes the tax status of the land for the ensuing fiscal year, and a subsequent voluntary transfer of the land to a tax-exempt body does not operate to extinguish the tax liability. *Board of Com'rs of Comanche County, Oklahoma*, v. *Central Baptist Church*, 136 Okla. 99, 276 Pac. 726.

The rule laid down in *United States* v. *Alabama, supra*, was applied to Oklahoma taxes on August 22, 1942, in

Board of Com'rs of Creek County, Oklahoma, v. *Seber et al.*, — S. Ct. —, 318 U. S. 705, 87 L. ed. 807, affirming 130 Fed. (2d) 663. Also see *Muskogee County* v. *United States* (Tenth Circuit), 133 Fed. (2d) 61.

The Circuit Court thus ignores the holdings of these cases and it is contended that it has thereby erroneously ruled the lands in the instant case to be taxable for the year 1940.

CONCLUSION

It is respectfully submitted that this case is of such a nature that the supervisory power of this Court in the matter of issuance of writs of certiorari should be exercised. A definitive decision on the points raised here would thus be a vehicle clearing the confusion resulting from the Circuit Court opinion which plots an uncontrolled course of action for the Secretary of the Interior, and in settling the jurisdictional question which, as affects the United States of America, is still of first impression.

Respectfully submitted,

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